

IN THE UNITED STATES PATENT AND TRADEMARK OFFICE

In re:	Application No. 10/736,037)	
)	
Filed:	December 15, 2003)	<i>Confirmation No. 4023</i>
)	
Applicants:	Carrie Melinda KINCAID et al.)	
)	
Title:	EDIBLE SPREAD COMPOSITION AND PACKAGED PRODUCT)	This Application For Patent Term Adjustment was electronically filed on May 1, 2009 using EFS-Web.
)	
Art Unit:	1794)	
)	
Examiner:	Carolyn A. PADEN)	
)	
Patent No.:	US 7,498,050 B2)	
)	
Issued:	March 3, 2009)	
)	
Attorney Docket:	1410/77005)	
)	
Customer No.:	48940)	

Mail Stop PETITION
Commissioner for Patents
P. O. Box 1450
Alexandria, Virginia 22313-1450

APPLICATION FOR PATENT TERM ADJUSTMENT
UNDER 37 C.F.R. § 1.705(d)

Sir:

Reconsideration is respectfully requested of the Patent Term Adjustment indicated on the face of the issued patent for the above-identified application to be 399 days. Applicants respectfully submit that the Patent Term Adjustment should be 662 days under 37 C.F.R. §§ 1.703-1.705 and 35 U.S.C. § 154(b) since the Patent Term Adjustment indicated on the face of the patent improperly overlaps A period delay with B period delay, instead of adding such delays.

Application No. 10/736,037
APPLICATION FOR PATENT TERM ADJUSTMENT
UNDER 37 C.F.R. § 1.705(d) dated May 1, 2009
Patent No. US 7,498,050 B2, Issued March 3, 2009

Reference is made to the September 30, 2008 decision of the United States District Court for the District of Columbia in Civil Action No. 07-1494, in the case of *Wyeth et al. v. Jon W. Dudas*, 88 U.S.P.Q.2d (D.D.C. 2008). In that decision, it was held that the United States Patent and Trademark Office ("USPTO") practice of granting either the greater of the A period (i.e., delay under 35 U.S.C. § 254(b)(1)(A)) or the B period (i.e., delay under 35 U.S.C. § 254(b)(1)(B)) that would be due a patentee under 35 U.S.C. § 154(b)(1) was not in accordance with the statute, and that there is due to a patentee a term extension in an amount equal to the A period plus the B period, except for any actual overlap between the two periods. In calculating these two periods, computation of the A period begins at fourteen (14) months following the filing date and calculation of the B period begins at three (3) years following the filing date. We note that the USPTO has since appealed this decision, and that as of this date the appeal has not yet been resolved.

Thus, computing the Patent Term Adjustment consistent with the standard as ruled in *Wyeth v. Dudas*, Applicants respectfully submit that the Patent Term Adjustment should be 662 days.

The present application was filed December 15, 2003. As supported by the attached AIPA Term Calculation Report, the A period delay of 37 C.F.R. § 1.703(a), which began on February 16, 2004 and ended on October 12, 2006, is equal to 604 days (see Row A on page 2). The B period delay of 37 C.F.R. § 1.703(b), which began on December 16, 2006, is equal to 269 days based on issuance of the patent on March 3, 2009 (see Row B on page 2). The period of actual overlap of the A period delay and the B period delay is 0 days (see page 6). Thus, the non-overlapping portion of the A period delay and the B period delay is 873 days (see page 6). Applicants have delayed a total of 217 days under 37 C.F.R. § 1.704 (see Rows D and F on page 3, Rows I and K on page 4, and Row L on page 5). However, the period of actual overlap of the K period delay and the L period delay is 6 days. The 540 days of Exclusion (as listed in Row H on page 4) were due to the filing of a Request For Continued Examination on September 11, 2007. The 540 "Exclusion Days" reduced the number of "Credit Days" in

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Row B on page 2 to 269 days. The attached AIPA Term Calculation Report is calculated consistent with the District Court ruling in *Wyeth v. Dudas* (see Row B on page 2). Thus, the Patent Term Adjustment calculated according to the *Wyeth* standard, and which is consistent with 35 U.S.C. § 254(b), should be 662 days ($604 + 269 - 217 + 6$ days), not 399 days as indicated on the face of the issued patent (see pages 1 and 6).

This patent is not subject to a terminal disclaimer.

Applicants submit that this Application does not raise issues that could have been raised in an Application for Patent Term Adjustment under 37 C.F.R. § 1.705(b), and is filed within two months of the date of issuance. Thus, Applicants submit that this Application is timely filed under 37 C.F.R. § 1.705(d) and must be considered.

Authorization to charge Deposit Account No. 06-1135 for the fee under 37 C.F.R. § 1.18(e), according to 37 C.F.R. § 1.705(d) and 37 C.F.R. § 1.705(b)(1), was given using EFS-Web. Because the necessity for filing this request is premised upon the USPTO's calculation of the Patent Term Adjustment in a manner not in accordance with the statute, Applicants respectfully request that this fee be refunded.

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The Commissioner is hereby authorized to charge any additional fees which may be required with respect to this communication, or credit any overpayment, to Deposit Account No. 06-1135.

Respectfully submitted,
FITCH, EVEN, TABIN & FLANNERY

Dated: May 1, 2009

/Eric D. Misfeldt/
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Appendix: AIPA Term Calculation Report

AIPA Term Calculation Report

Docket Number:	1410-77005	User Name:	Hlebasko, Susan
Application Number:	10/736,037	Firm/Company Name:	Fitch, Even, Tabin & Flannery
Filing Date:	12/15/2003	User Comments:	
Title/Inventor(s):	EDIBLE SPREAD COMPOSITION AND PACKAGED PRODUCT; Carrie Melinda Kincaid, Chicago, IL	Calculation Generated:	05/01/2009 09:38:51 AM ET

AIPA TERM CALCULATION SUMMARY	
Earliest Referenced Application under 35 USC § 120, 121, or 365(c):	12 / 15 / 2003
Filing Date (US National Application):	12 / 15 / 2003
Net Adjustment Credits:	873 Days
Net Adjustment Debits:	211 Days
Patent Term Adjustment:	662 Days
AIPA Patent Term End Date:	10 / 07 / 2025 (1)
(1) Assumes payment of all maintenance fees, no intervening acts, and no 35 USC 156 regulatory extensions. Terminal disclaimer(s) filed in this case, if any, may result in an earlier term end date. Without adjustment, the term would end on 12/15/2023.	

COMPARISON TO USPTO PAIR PTA TABS (2) (Based on PAIR Data from 05/01/2009)			
Credit Days (USPTO Delay):	604	873	x
Debit Days (Applicant Delay):	205	211	x
Total Patent Term Adjustment Days:	399	662	x
(2) Comparison is shown for USPTO Delay, Applicant Delay, and Total Patent Term Adjustment fields displayed on USPTO PAIR Patent Term Adjustments (PTA) tab on 05/01/2009. See the full PAIR PTA tab, file wrapper (e.g., Notice of Allowance, PTA-related petitions), and issued patent for complete information on USPTO-calculated PTA.			

RULE CATEGORY NON-SUMMARY (C)									
	Applicant	Rule Invoked	Related Event	Exclusion	DDMT ID	Credit			
A	12/15/2003 Filing Date under 35 USC 111(a) (US National Application)	14-Month PTO First Action PTO must mail a notification under 35 USC 132 or a notice of allowance under 35 USC 151 not later than 14 months after the date on which the application was filed under 35 USC 111(a) or fulfilled the requirements of 35 USC 371 in an international application. Period of adjustment (credits) begins on the day after the date that is 14 months after the date on which the application was filed under 35 USC 111(a) or fulfilled the requirements of 35 USC 371 and ending on the date of mailing of either an action under 35 USC 132, or a notice of allowance under 35 USC 151, whichever occurs first. 35 USC 154(b)(1)(A)(i); 37 CFR 1.702(a)(1), 1.703(a)(1).	<i>First PTO Action:</i> 10/12/2006 Non-final Action			604			
B	12/15/2003 Filing Date under 35 USC 111(a) (US National Application)	3-Year PTO Issue of Patent PTO must issue a patent within 3 years (not including exclusions) after the date on which the application was filed under 35 USC 111(a) or the national stage commenced under 35 USC 371(b) or (f) in an international application. Period of adjustment (credits) begins on the day after the date that is 3 years after the date on which the application was filed under 35 U.S.C. 111(a) or the national stage commenced under 35 USC 371(b) or (f) in an international application and ending on the date a patent was issued, but not including the sum of the listed exclusionary periods. 35 USC 154(b)(1)(B); 37 CFR 1.702(b), 1.703(b). You have elected to analyze this rule without applying the USPTO 37 CFR § 1.703(f) Actual Delay limitation in determining Credit Days under this rule. This is consistent with DC District Court ruling in Wyeth et al. v. Dudas, No. 07-1492 (D.D.C. September 30, 2008).	<i>Issue Date:</i> 03/03/2009 Issue Date			269			
C	03/25/2004 Notice to File Missing Parts (nonprovisional application)	3-Month Applicant Response to Notice or Action Period of adjustment (credits) shall be reduced for the period in excess of 3 months taken to reply to any PTO notice or action making any rejection, objection, argument, or other request, beginning on the day after the date that is 3 months after the date of mailing or transmission of the Office communication and ending on the date the reply was filed. The period, or shortened statutory period, for reply set in the action or notice has no effect on this deadline. 35 USC 154 (b)(2)(C)(ii); 37 CFR 1.704(b). Where applicant shows, in spite of all due care, applicant was unable to respond within the 3-month period, all or part of adjustment may be reinstated for up to 3 additional months. 35 USC 154(b)(3)(C); 37 CFR 1.705(c). You have indicated that no 1.705(c) Showing of Due Care was made.	<i>Applicant Response:</i> 05/14/2004 Filing Fee Payment (Original or Supplemental)		0				

D	10/12/2006 Non-final Action	<p><u>3-Month Applicant Response to Notice or Action</u></p> <p>Period of adjustment (credits) shall be reduced for the period in excess of 3 months taken to reply to any PTO notice or action making any rejection, objection, argument, or other request, beginning on the day after the date that is 3 months after the date of mailing or transmission of the Office communication and ending on the date the reply was filed. The period, or shortened statutory period, for reply set in the action or notice has no effect on this deadline. 35 USC 154 (b)(2)(C)(ii); 37 CFR 1.704(b).</p> <p>Where applicant shows, in spite of all due care, applicant was unable to respond within the 3-month period, all or part of adjustment may be reinstated for up to 3 additional months. 35 USC 154(b)(3)(C); 37 CFR 1.705(c).</p> <p>You have indicated that no 1.705(c) Showing of Due Care was made.</p>	Applicant Response: 03/06/2007 Reply after Non-final Action under 37 CFR 1.111	53	
E	03/06/2007 Reply after Non-final Action under 37 CFR 1.111	<p><u>4-Month PTO Response to Applicant Reply</u></p> <p>PTO must respond to a reply under 35 USC 132 not later than 4 months after the date on which the reply was filed. The period of adjustment (credits) begins on the day after the date that is 4 months after the date a reply under 37 CFR 1.111 or in compliance with 37 CFR 1.113(c) was filed and ending on the mailing date of either an action under 35 USC 132, or a notice of allowance under 35 USC 151, whichever occurs first. 35 USC 154(b)(1)(A)(ii); 37 CFR 1.702(a)(2), 1.703(a)(2),(3).</p>	PTO Response: 04/12/2007 Final Rejection		0
F	04/12/2007 Final Rejection	<p><u>3-Month Applicant Response to Notice or Action</u></p> <p>Period of adjustment (credits) shall be reduced for the period in excess of 3 months taken to reply to any PTO notice or action making any rejection, objection, argument, or other request, beginning on the day after the date that is 3 months after the date of mailing or transmission of the Office communication and ending on the date the reply was filed. The period, or shortened statutory period, for reply set in the action or notice has no effect on this deadline. 35 USC 154 (b)(2)(C)(ii); 37 CFR 1.704(b).</p> <p>Where applicant shows, in spite of all due care, applicant was unable to respond within the 3-month period, all or part of adjustment may be reinstated for up to 3 additional months. 35 USC 154(b)(3)(C); 37 CFR 1.705(c).</p> <p>You have indicated that no 1.705(c) Showing of Due Care was made.</p>	Applicant Response: 09/11/2007 Request for Continued Examination under 35 U.S.C. 132(b)	61	
G	09/11/2007 Request for Continued Examination under 35 U.S.C. 132(b)	<p><u>4-Month PTO Response to Applicant Reply</u></p> <p>PTO must respond to a reply under 35 USC 132 not later than 4 months after the date on which the reply was filed. The period of adjustment (credits) begins on the day after the date that is 4 months after the date a reply under 37 CFR 1.111 or in compliance with 37 CFR 1.113(c) was filed and ending on the mailing date of either an action under 35 USC 132, or a notice of allowance under 35 USC 151, whichever occurs first. 35 USC 154(b)(1)(A)(ii); 37 CFR 1.702(a)(2), 1.703(a)(2),(3).</p>	PTO Response: 10/25/2007 Non-final Action		0

II	09/11/2007 Request for Continued Examination under 35 U.S.C. 132(b)	Exclusion for Continued Examination 3-Year PTO Issue Requirement does not include the period consumed by continued examination of the application under 35 USC 132(b), beginning on the date on which a request for continued examination of the application under 35 USC 132(b) was filed and ending on the date the patent was issued. 35 USC 154(b)(1)(B)(i); 37 CFR 1.702(b)(1), 1.703(b)(1).	Issue Date: 03/03/2009 Issue Date	540		
I	10/25/2007 Non-final Action	3-Month Applicant Response to Notice or Action Period of adjustment (credits) shall be reduced for the period in excess of 3 months taken to reply to any PTO notice or action making any rejection, objection, argument, or other request, beginning on the day after the date that is 3 months after the date of mailing or transmission of the Office communication and ending on the date the reply was filed. The period, or shortened statutory period, for reply set in the action or notice has no effect on this deadline. 35 USC 154 (b)(2)(C)(ii); 37 CFR 1.704(b). Where applicant shows, in spite of all due care, applicant was unable to respond within the 3-month period, all or part of adjustment may be reinstated for up to 3 additional months. 35 USC 154(b)(3)(C); 37 CFR 1.705(c). You have indicated that no 1.705(c) Showing of Due Care was made.	Applicant Response: 04/25/2008 Reply after Non-final Action under 37 CFR 1.111		91	
J	04/25/2008 Reply after Non-final Action under 37 CFR 1.111	4-Month PTO Response to Applicant Reply PTO must respond to a reply under 35 USC 132 not later than 4 months after the date on which the reply was filed. The period of adjustment (credits) begins on the day after the date that is 4 months after the date a reply under 37 CFR 1.111 or in compliance with 37 CFR 1.113(c) was filed and ending on the mailing date of either an action under 35 USC 132, or a notice of allowance under 35 USC 151, whichever occurs first. 35 USC 154(b)(1)(A)(ii); 37 CFR 1.702(a)(2), 1.703(a)(2),(3).	PTO Response: 06/25/2008 Final Rejection			0
K	05/01/2008 Affidavit(s), Declaration(s), or Exhibit(s) Received	Supplemental Reply or Other Paper Period of adjustment (credits) shall be reduced where applicant submits a supplemental reply or other paper, not expressly requested by the examiner, after a reply has been filed, for the period beginning on the day after the date the initial reply was filed and ending on the date that the supplemental reply or other such paper was filed. 37 CFR 1.704(c)(8). You have indicated the supplemental reply or other paper was not expressly requested by the examiner.	Initial Reply: 04/25/2008 Reply after Non-final Action under 37 CFR 1.111		6	

L	05/01/2008 Affidavit(s), Declaration(s), or Exhibit(s) Received	Supplemental Reply or Other Paper Period of adjustment (credits) shall be reduced where applicant submits a supplemental reply or other paper, not expressly requested by the examiner, after a reply has been filed, for the period beginning on the day after the date the initial reply was filed and ending on the date that the supplemental reply or other such paper was filed. 37 CFR 1.704(c)(8). You have indicated the supplemental reply or other paper was not expressly requested by the examiner.	<i>Initial Reply:</i> 04/25/2008 Reply after Non-final Action under 37 CFR 1.111	6	
M	06/25/2008 Final Rejection	3-Month Applicant Response to Notice or Action Period of adjustment (credits) shall be reduced for the period in excess of 3 months taken to reply to any PTO notice or action making any rejection, objection, argument, or other request, beginning on the day after the date that is 3 months after the date of mailing or transmission of the Office communication and ending on the date the reply was filed. The period, or shortened statutory period, for reply set in the action or notice has no effect on this deadline. 35 USC 154 (b)(2)(C)(ii); 37 CFR 1.704(b). Where applicant shows, in spite of all due care, applicant was unable to respond within the 3-month period, all or part of adjustment may be reinstated for up to 3 additional months. 35 USC 154(b)(3)(C); 37 CFR 1.705(c). You have indicated that no 1.705(c) Showing of Due Care was made.	<i>Applicant Response:</i> 09/24/2008 Amendment after Final	0	
N	09/24/2008 Amendment after Final	4-Month PTO Response to Applicant Reply PTO must respond to a reply under 35 USC 132 not later than 4 months after the date on which the reply was filed. The period of adjustment (credits) begins on the day after the date that is 4 months after the date a reply under 37 CFR 1.111 or in compliance with 37 CFR 1.113(c) was filed and ending on the mailing date of either an action under 35 USC 132, or a notice of allowance under 35 USC 151, whichever occurs first. 35 USC 154(b)(1)(A)(ii); 37 CFR 1.702(a)(2), 1.703(a)(2),(3).	<i>PTO Response:</i> 10/17/2008 Notice of Allowance under 35 USC 151	0	
O	10/17/2008 Notice of Allowance under 35 USC 151	3-Month Applicant Response to Notice or Action Period of adjustment (credits) shall be reduced for the period in excess of 3 months taken to reply to any PTO notice or action making any rejection, objection, argument, or other request, beginning on the day after the date that is 3 months after the date of mailing or transmission of the Office communication and ending on the date the reply was filed. The period, or shortened statutory period, for reply set in the action or notice has no effect on this deadline. 35 USC 154 (b)(2)(C)(ii); 37 CFR 1.704(b). Where applicant shows, in spite of all due care, applicant was unable to respond within the 3-month period, all or part of adjustment may be reinstated for up to 3 additional months. 35 USC 154(b)(3)(C); 37 CFR 1.705(c). You have indicated that no 1.705(c) Showing of Due Care was made.	<i>Applicant Response:</i> 01/16/2009 Issue Fee Payment under 35 USC 151	0	

P 01/16/2009 Issue Fee Payment under 35 USC 151	4-Month PTO Issue of Patent PTO must issue a patent not later than 4 months after the date on which the issue fee was paid under 35 USC 151 and all outstanding requirements were satisfied. The period of adjustment (credits) begins on the day after the date that is 4 months after the date the issue fee was paid and all outstanding requirements were satisfied and ends on the day the patent issues. 35 USC 154(b)(1)(A)(iv); 37 CFR 1.702(a)(4), 1.703(a)(6).	Issue Date: 03/03/2009 Issue Date			0
Total Exclusion, Debit, and Credit Days:					
Overlap Days (7) :			540	217	873
Net Exclusion, Debit, and Credit Days:			0	6	0
Patent Term Adjustment Days (8) :			540	211	873
					662
<p>(3) Calculations of Debit, Credit, and Exclusion Days are determined by the rule assignments, assignments of related events, and analysis options in the Apply Term Rules tab. The patent professional using this system is responsible for reviewing and updating the Apply Term Rules tab to ensure all data is complete, correct, and consistent with their judgment and interpretation of applicable legal authority.</p> <p>(4) Exclusion Days are periods which are not included in determining the end of the 3-year period after the date on which the application was filed under 35 USC 111(a), or the national stage commenced under 35 USC 371(b) or (f) in an international application, used to determine credits under the 3-Year PTO Issue of Patent rule. See 35 USC 154(b)(1)(B)(i)-(iii); 37 CFR 1.702(b)(1)-(5), 1.703(b)(1)-(4).</p> <p>(5) Debit Days are days where grounds for reduction of period of adjustment of patent term exist. See, e.g., 37 CFR 1.704. Debit Days are sometimes referred to as Applicant Delay.</p> <p>(6) Credit Days are days where grounds for adjustment of patent term exist. See, e.g., 37 CFR 1.702, 1.703. Credit Days are sometimes referred to as USPTO Delay.</p> <p>(7) To the extent credit periods overlap other credit periods, debit periods overlap other debit periods, or exclusion periods overlap other exclusion periods, overlaps are subtracted so that each calendar day generates at most one credit day, one debit day, and one exclusion day.</p> <p>(8) Patent Term Adjustment Days equals Net Credit Days minus Net Debit Days, but is not less than zero.</p>					